APPENDIX A

FIRST POINT

Portions of Decisions Below Re Government's Wreck-Removal Expenses

1. Of the Trial Court

a. Memorandum Opinion, January 28, 1963.

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"*Claim of the United States Government*—

"The United States makes claim for $35,801.38. This consists of a number of items, some for preparing and towing the disabled vessel to an anchorage in Bolivar Roads November 10, 1961; for services of a standby tug while so anchored November 10-27, 1961; for hire of a 'ship keeper', around the clock, November 27, 1961 to January 12, 1962; and for overhead charges of the Corps of Engineers.

"As noted earlier, following the collision the Union Reliance was a burning wreck swinging on her anchor in the Houston Ship Channel. This navigable waterway was effectively blocked, with a number of vessels trapped up stream in the Port of Houston. Under § 409 of Title 33, U.S.C.A., the duty was imposed upon Petitioner immediately to remove the wreck and to clear the Channel. Petitioner was unable or unwilling to do so, and her representative (Mr. Eikel) so advised the Engineers. Proceeding under § 415 of Title 33, U.S.C.A. on November 10, while still unable to board the vessel the Engineers had her anchor cut and the vessel towed to safe anchorage in Bolivar Roards. The sum of $8,582.00 was expended for this operation. I find that this sum was properly spent for this purpose by the Engineers, was reasonable in amount, and was necessary to clear the Channel.

"Proceeding under § 415 of Title 33, U.S.C.A., the United States filed its libel in this Court November 17,

1961, seeking sale of the vessel and her cargo, and seeking personal recovery against Petitioner for certain other expenses alleged to constitute legitimate salvage items. When the limitation proceeding was filed herein November 28, 1961, this libel by the United States, together with others against Petitioner, was enjoined. On more careful consideration I have concluded that this Court was in error in restraining the sale of the vessel and her cargo, in the event reimbursement was not made within the thirty day period provided by § 415.

"Under this Section, and the authorities interpreting it, it seems clear that these costs of clearing the navigable waterway do not give the United States an in personam claim against the shipowner. Loud v. United States, 286 F. 56 (6th Cir.); Hagan v. Richmond, 52 S.E. 385; Petition of Highlands Nav. Corporation, 29 F. (2d) 37 (2nd Cir.); 56 Am. Jur. 687, WATERS, § 227. They create no 'liability of the owner of any vessel . . . for any embezzlement, loss or destruction . . .' of any goods shipped on such vessel, or for any 'loss, damage, or injury by collision,' or otherwise, which may be limited under the terms of § 183 of Title 46, U.S.C.A. There is no liability of the owner at all. Rather, these costs are an in rem charge against the vessel and her cargo, to recover which the United States may sell both vessel and cargo. The United States was undertaking to follow this statutory procedure. She had maintained possession of the vessel, through the presence of the ship keeper and Deputy U.S. Marshal, until this Court intervened and took custody through its trustee under the limitation proceeding.

"Had this Court not intervened, on the Government's claim remaining unpaid by December 10, 1961, (being thirty days after the expense was incurred) the Government might have sold the vessel and her cargo. The statute does not make this right conditional. It exists irrespective of the Petitioner's right to limit.

Petitioner may not deprive the United States of its right of sale by undertaking to surrender the vessel. The payment of this sum—and release of this charge against the vessel—was necessary before she could be surrendered in a limitation proceeding. Hence, under § 185 of Title 46, U.S.C.A., I fix this sum of $8,582.00 as an additional amount to be deposited with this Court by Petitioner, for the use and benefit of the United States, as necessary to carry out the provisions of § 183 of Title 46, U.S.C.A.

"The other items of expense composing the claim of the United States were incurred after the vessel reached anchorage in Bolivar Roads. These were not a necessary part of clearing the Channel, and the extraordinary rights afforded by § 415 do not attach thereto. While—as the United States contends—the Union Reliance thereafter constituted a potential hazard to navigation—it does not follow that all of the expenses incurred by the Engineers in performance of their duty to protect commerce may be taxed here. I withhold passing upon whether this remaining portion of the Government's claim constituted salvage expense until trial on the merits.

"Proctor for the trustee is requested to prepare order for the payment of the claims mentioned above from the limitation fund; and providing for payment into the Registry by Petitioner of the amount of $8,582.00, within thirty days from this date, as a condition of maintaining the limitation proceeding." (R. 1152-1155)

b. Decision, July 17, 1963.

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Findings of Fact

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"44. The services rendered to the UNION RELIANCE while she was at anchor in Bolivar Roads, and

subsequent thereto, by the United States were, in the light of circumstances then existing, reasonable and necessary; and the charges made therefor reasonable in amount and consistent with charges generally made for similar services in that vicinity." (R. 5137-5138)

* * *

Conclusions of Law

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"9. China Union Lines, Ltd. is liable to the United States of America for the expenses incurred in connection with this incident and made the subject matter of the claim of the United States." (R. 5141)

c. Interlocutory Decree Determining Liability.

"ORDERED, ADJUDGED and DECREED in Admiralty No. 2012 that the United States of America, libelant, is entitled to recover its salvage charges, as a valid claim in rem against the M/V UNION RELIANCE, and the proceeds of the sale thereof now in the registry of the Court, and the amount of the government's reasonable salvage charges having been already determined; it is therefore, ORDERED and DIRECTED that after payment of all unpaid Trustee's expenses, United States of America is entitled to recover out of the amount now in the registry of the Court the sum of Twenty-Seven Thousand Two Hundred Nineteen and 38/100 Dollars ($27,219.38), with interest thereon at the rate of six per cent (6%) from the date hereof until paid, (the United States of America having already recovered out of the funds in the registry of the Court the sum of Eight Thousand Five Hundred Eighty-Two Dollars ($8,582))." (R. 5148-5149)

2. Of the Court of Appeals

* * *

CLAIM OF UNITED STATES

China Union alone challenges the claim of the United States. The claim consists of three separate items:

(1) expense of removing and re-anchoring the RELIANCE, $8,582.00, and

(2) expense of shipkeepers and similar expenses to preserve the property, $6,031.38, and

(3) expense of stand-by tug to prevent the vessel from moving and re-blocking the channel, $21,188.00.

That the RELIANCE, as a result of the casualty, became a flaming derelict which imperiled the very existence of other watercraft and obstructed and prevented the navigation of the channel, is beyond argument. The owner and underwriters were unable to control the fire. Acting under the emergency provisions of 33 U.S.C. § 415, the United States District Engineer, after a special investigation, made a determination that the RELIANCE was a special danger to navigation and, after notice to owner, directed that the vessel be towed from the channel and anchored in Bolivar Roads, adjacent to the channel.

After removal of the vessel, the United States filed a libel, asking for the sale of the vessel,[25] to pay the cost of removal and incidental expenses. This proceeding was enjoined, on November 29, 1961, on China Union's petition for a limitation of liability. After granting the injunction, the judge required China Union to pay into court the cost of removal of the vessel in the sum of $8,582.00. Other proceedings, and allowances, are outlined in detail in *American Cyanamid Co. v. China Union Lines* 306 F.2d

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[25] Sold as scrap for $109,100.00.

135 (5th Cir. 1962), in which proceeding the circuit court refused jurisdiction, but suggested that the district judge might make findings on the issues presented.

On the first issue, the Government must prevail. It had a statutory right to hold the vessel and cargo, dispose thereof at public sale and deduct from the proceeds $8,582.00, the expenses of removal. While the Government could not proceed *in personam*, against China Union, *United States v. Bethlehem Steel Corp.*, 319 F.2d 512 (9th Cir. 1963), *cert. denied* 375 U.S. 966 (1964) and *United States v. Zubik*, 295 F.2d 53 (3rd Cir. 1961), we must remember that it was China Union which was seeking the injunction and a limitation of its liability. It was to its advantage, and the advantage of its underwriters, to free the RELIANCE of the Government's statutory lien, and secure the decree of injunction. The judge, in requiring China Union to make this payment, recognized that the equities were with the Government and that the Government's lien was first in time and prior in right.[26] The order of the court did not amount to a judgment *in personam* against the petitioner, but merely required China Union to do what it should have done in the first instance.

On December 3, 1962, after receipt of the mandate of the Court of Appeals, the judge held a supplemental

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[26] "Had this Court not intervened . . . the Government might have sold the vessel and her cargo. The statute does not make this right conditional. It exists irrespective of the Petitioner's right to limit. Petitioner may not deprive the United States of its right of sale by undertaking to surrender the vessel. The payment of this sum—and release of this charge against the vessel—was necessary before she could be surrendered in a limitation proceeding. Hence, under § 185 of Title 46, U.S.C.A., I fix this sum of $8,582.00 as an additional amount to be deposited with this Court by Petitioner, for the use and benefit of the United States, as necessary to carry out the provisions of § 183 of Title 46, U.S.C.A." (Order, January 28, 1963.)

hearing, at which time testimony was taken and exhibits introduced in connection with the nature and reasonableness of the Government's and other claims. Eighteen witnesses testified at this hearing and there is solid evidence to support the finding in favor of the Government. The fact that the judge's finding on the subject, is included under his conclusions of law,[27] is of no significance. *Compania Transcontinental de Petroleo, S.A. v. Mexican Gulf Oil Co., et al,* 292 Fed. 846 (2d Cir. 1923); *Arkansas Amusement Corp. v. Kempner,* 57 F.2d 466 (8th Cir. 1932). Even in the absence of a finding of fact, this being a trial *de novo,* we would be compelled to say that the record fully supports the pertinent provisions of the interlocutory decree. True enough, specific amounts are not mentioned in this finding. However, there can be no misunderstanding as to the amounts, in that the division of the Government's claim, both in the exhibits and the testimony, was uniform and precise. They are the figures which are set forth, with exactness, in the interlocutory decree.

It is our view that item (3) of the Government's claim is also covered by the provisions of 33 U.S.C. § 415, and that the lien against the RELIANCE for such item was also first in time and prior in right. The statute contemplates that the Government hold said vessel for a period of thirty days, after notice to the owner, and thereafter until sale. It is logical to assume that the Congress intended the Government to take proper care of the vessel during possession. The "expense of removing," in our opinion, should not be limited to the precise cost of removing the vessel from the place of the casualty to a place of safety, but should also cover any and all reasonable expense incidental

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[27] "9. China Union Lines, Ltd. is liable to the United States of America for the expenses incurred in connection with this incident and made the subject matter of the claim of the United States."

to the removal and enforcement process, such as the expense of safe-guarding. This expense is contemplated by the statute. Petitioner's arguments that the tug hire of $21,188.00 was not a legitimate expense, is illusory in the extreme. The record discloses many considerations which weighed in favor of having the tug stand by, rather than using two anchors. The District Engineer, after consultation with Coast Guard officers, decided to use only one anchor and have the tug stand by, so as to be assured of its immediate availability in case the anchor did not hold. Those making the decision were of the opinion that (1) two anchors might foul the vessel, (2) the anchor windlass and the deck supporting it had been subjected to severe fire, (3) the "upper shots" of the anchor chain had been subjected to severe heat, (4) the Galveston area was subject to severe changes in weather conditions, (5) the tide was exceptionally swift where the vessel was anchored, and (6) the vessel, even with dual anchors, might well slip back into the channel. True enough, the court eventually found that the tug was not necessary to keep the RELIANCE at its anchorage, and this is the point on which China Union principally relies. Here, the mischievous aura of validity which lurks behind the veil of hindsight is again presented. The original action of the District Engineer in ordering the tug to stand by, when viewed in light of his obligation to protect the traffic in the channel without unduly jeopardizing the vessel and its cargo, is quite understandable. The judge's action, in subsequently ordering the tug dismissed, was taken after more than two weeks of actual experience in holding the vessel at anchor. It does not imply disapproval of its previous use; indeed, doubtless because of his own wise reluctance to be governed by hindsight, the judge expressly refused to pass on that question at that time. The record reveals no subsequent

developments weighing against his ultimate approval of the charge.

On November 27, 1961, the judge dismissed the tug from standing by the RELIANCE and, on that day, placed shipkeepers aboard pending the further order of the court. At the same time, custody of the vessel was taken by the United States Marshal and the court was thereafter in possession. Earlier, on November 24th, the District Engineer, acting on order from the United States Attorney's office, caused shipkeepers to be placed aboard and the cost of employing those shipkeepers, round the clock, both before and after the court order is, in major part, the basis for the Government's claim of $6,031.38. China Union charges that the Government was no longer in possession of the vessel and is not entitled to this allowance. This claim is without validity, whether we view the service performed as under the statute, or as an allowance by the court to the Government for expense incurred in connection with protecting the vessel, after the seizure by the Marshal. Our only area of doubt is whether any allowance should be made for the three day period November 24-27, when the tug was also standing by. It does not appear that this "over-lapping" was called to the attention of the judge and he may want to take another look at this feature in the other proceedings which must be hereafter conducted by him. We believe that the employment of the shipkeepers on and after November 27th, should be treated as an "expense of justice" and entitled to perferential treatment. *New York Dock Co. v. S.S. POZNAN*, 274 U.S. 117 (1927); *THE ST. PAUL*, 271 Fed. 265 (2d Cir. 1921). Since these expenses were necessary they should be allowed. *Yokahama Bank v. Wong*, 113 F.2d 329 (9th Cir. 1940); *THE TRANSFER NO. 7*, 176 F.2d 950 (2d Cir. 1949).

APPENDIX B

SECOND POINT

Portions of Decisions of the Courts Below Re the BEREAN'S Acrylonitrile Cargo

1. Of the Trial Court

a. Trial ruling dismissing Libels against American Cyanamid Company.

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"As to the motion of American Cyanamid Company for judgment at the conclusion of the petitioner's case, I think the motion is well taken and will be granted. As the manufacturer and shipper of an inherently dangerous commodity, I understand the law to impose on them the duty to warn and advise others who may come in contact with it of its dangerous propensities. I think the evidence shows clearly here that that was done, that the carrier was fully advised of the dangerous characteristics of the cargo, and without deciding the question, but if there be any fault in the way the BEREAN was loaded, as to which tanks the cargo was carried, and so forth, I consider that to be a fault of the vessel and of Andersen, and not of the shipper." (R. 3454-3455)

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* * *

b. Decision, July 17, 1963.

Findings of Fact

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"10. On November 6, 1961, the BEREAN loaded 14 tons of acrylonitrile at Good Hope, Louisiana. Upon the direction of the officers of the vessel, this shipment was placed in the forwardmost cargo tanks of the BEREAN, being No. 1 port, No. 1 center, and No. 1 starboard.

"11. Acrylonitrile is similar to gasoline in its burning and explosive characteristics. However, it is highly toxic, and gives off poisonous and dangerous fumes. These fumes will cause illness to a person exposed thereto in relatively weak concentrations over a prolonged period of time; and may cause illness or death from a single exposure if in a sufficiently high concentration. The symptoms of acrylonitrile poisoning are somewhat similar to those of cyanide poisoning. Acrylonitrile is and was at the time of the casualty classified under pertinent Coast Guard regulations as a Grade C flammable liquid (46 C.F.R. 146.21-100), as is gasoline, benzine, naphtha, etc. It is not classified as an 'extremely dangerous poison', nor as a 'less dangerous poison' (46 C.F.R. 146.25-5; 146.25-10)." (R. 5124)

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"26. . . . The impact was not severe, and injured no one. It was hardly felt in some portions of the two vessels. However, the bow of UNION RELIANCE breached the No. 1 port tank of BEREAN, causing its acrylonitrile cargo to become ignited and to explode. Quantities of the burning liquid were thrown upon the foredeck of UNION RELIANCE which in turn was ignited. The vessel continued to burn for several days, as noted above, and she became a constructive total loss.

"27. As a result of the fire caused by the collision, Houston Ship Channel Pilot Duncan and the following crew members of UNION RELIANCE were killed: Lan Jing-chau, Chen Teh-Yao, Wu Hsing-Rei, Wu Shih-Ming, Pao Fuh-Gen, Huang Ah-Tong, Hu Ah-Wang, Ting Chea-Fah, Yuan Sing-Wang, Hsia Lian-Yen, and Koo Kuang-Yan; and the following were injured: Hau Wen-Tsai and Mang Han-Ying. In addition, much of the cargo of the UNION RELIANCE (principally that in the forward holds of the vessel) was lost, as well as the personal effects of the crew." (R. 5130)

* * *

"40. BEREAN was not at fault in carrying acrylonitrile cargo in her forward tanks. She violated no Coast Guard regulation by doing so, and I find this was not a negligent or careless manner of loading."[5]

* * *

Conclusions of Law

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"4. The only fault of the BEREAN having been one which did not and, under the circumstances, could not have contributed to the collision, A/S Andersen & Co., and the BEREAN *in rem* are not liable to any of the libelants who have made claims against them, and are exonerated and freed of liability in these actions." (R. 5140)

c. Interlocutory Decree Determining Liability

"* * *

"ORDERED, ADJUDGED and DECREED, in Admiralty No. 2006, libelant, China Union Lines, Ltd., recover nothing against respondent, A/S A. O. Andersen & Co. and the M/V BEREAN, and the libel is dismissed with costs, and that A/S A. O. Andersen & Co., as cross-libelant therein, recover of and from the M/V UNION RELIANCE and cross-respondent, China Union Lines, Ltd., the damages sustained by it in consequence of the matters referred to in the cross-libel, and costs: It is, further,

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[5] "While petitioner offered evidence tending to show that a greater safety factor would result if there were inner lining of the tank so that an air space was maintained between the skin of the ship and the outer wall of the wing tanks, these experts conceded that it was the custom and practice to carry gasoline and other inflammable and explosive liquids in tanks immediately adjacent to the skin of the ship." (R. 5136-5137)

"ORDERED, ADJUDGED and DECREED that in Admiralty No. 2007, libelant, American Cyanamid Company, shall recover of and from the M/V UNION RELIANCE and her owner, China Union Lines, Ltd., the damages sustained by libelant in consequence of the matters referred to in said libel, together with costs; and the cross-libel filed in Admiralty No. 2007, by China Union Lines, Ltd. against American Cyanamid Company is dismissed with costs, and any intervening libels or cross-libels against American Cyanamid Company in any of the actions consolidated in Admiralty No. 2018 are hereby dismissed with costs;" (R. 5149-5150)

2. OF THE COURT OF APPEALS

a. Opinion of the Court

* * *

CLAIM AGAINST CYANAMID

China Union and the Consul General complain of the action of the judge in dismissing the libel against Cyanamid. Aside from the subject discussed under Assignment V, the appellants pose two additional assignments against Cyanamid: (1) the procedure on the dismissal, and (2) that Cyanamid had actual knowledge, or by the exercise of reasonable diligence should have known, of the dangerous, poisonous and lethal characteristics of acrylonitrile, of which the Coast Guard and BEREAN had no knowledge.

At the outset, we must stress the grave doubts we entertain on whether China Union has standing to press these assignments. The damage to RELIANCE and its cargo was caused by fire, not by the poisonous or toxic qualities of the chemical. Since gasoline and other such products are as flammable and explosive as acrylonitrile and since such other products may be legally carried in forward tanks,

next to the skin of the ship, it would seem that no causal relationship exists between the toxicity of that chemical and the fire damage to China Union's property, or its cargo.

(1) The first point is one of procedure, rather than substance. The record shows that during the course of the trial, the judge asked all parties if all evidence, except as to damages, had been presented against Cyanamid. After counsel for the respective parties indicated that they had no additional evidence to offer against that company, its proctor moved for a dismissal.[19] Forty pages of the record are devoted to a transcription of the arguments of the proctors on this motion. No claim was made that there was additional evidence to offer on the subject. For that matter, the precise issues raised on this appeal were fully argued to the judge. At the conclusion of the arguments, the motion was taken under advisement and was not decided until the following morning, at which time the judge found in favor of Cyanamid.[20] Obviously, the judge made findings on the issues then before him. In the formal findings,

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19 "Mr. Waesche: If Your Honor please, in that event we would like to move to dismiss the action against American Cyanamid, on the grounds that the libelants have failed to establish a cause of action against them." (R. 3413.)

20 "As to the motion of American Cyanamid Company for judgment at the conclusion of the petitioner's case, I think the motion is well taken and will be granted. As the manufacturer and shipper of an inherently dangerous commodity, I understand the law to impose on them the duty to warn and advise others who may come in contact with it of its dangerous propensities. I think the evidence shows clearly here that that was done, that the carrier was fully advised of the dangerous characteristics of the cargo, and without deciding the question, but if there be any fault in the way BEREAN was loaded, as to which tanks the cargo was carried, and so forth, I consider that to be a fault of the vessel and of Andersen, and not of the shipper." (R.3454.)

the judge made it clear that he was passing on the issue of the liability.[21] We must view this record as the findings of the judge on the issues then presented. Those findings, unless clearly erroneous, even though informal, are binding on us. *Myles v. Quinn Menhadden Fisheries*, 302 F.2d 146 (5th Cir. 1962). The fact that the findings were made on a motion for dismissal, or for a *directed verdict*, as argued by one of appellants, is of no significance.

(2) On the motion for dismissal, the proctor for Cyanamid argued that the evidence almost conclusively demonstrated that the Chinese crew men died or were injured as a result of the raging fire, on the water and on the RELIANCE. Proctor for the dead and injured seamen, on the other hand, argued that the men died from, or were injured by, the toxic and poisonous effects of the chemical. Cyanamid pointed to the evidence of a young lieutenant of the Coast Guard who testified that he and his men worked right at the hatch where the particular cargo was loaded, and from there fought the fire with no ill effects. A number of the members of the crew of the BEREAN testified that they went forward and fought the fire with no ill effects. The master of the tug boat said that he was in there fighting the fire. Members of the crew of RELIANCE were on the foredeck fighting the fire. Most of the photographs of decedents, with one exception, disclose faces and bodies that were "badly charred."

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21 ". . . **At the close of petitioner's case, the Court afforded all parties an opportunity to introduce evidence bearing on the issue of the liability of American Cyanamid Company; and was advised by all counsel that the claim against American Cyanamid rested solely on the evidence produced by petitioner.** The Court was of the view that petitioner had failed to show a cause of action against American Cyanamid on behalf of UNION RELIANCE, her cargo interests, or others, and dismissed the libels against the respondent." (Emphasis supplied.) (R. 5118.)

The one major exception was the picture of a Chinese second mate, who evidently died in the cabin deck washroom. He was not burned, nor was there anything else observed which pointed to the cause of his death. The photograph in evidence, and the testimony shows, that the pilot Duncan was burned beyond recognition.

In support of his position, proctor for the injured and decedents, called attention to the unburned body of the second mate that was found in the washroom, the body of the oiler-wiper who was found above the main deck and who was not "burned too seriously," and to the testimony of the funeral director that he examined five bodies which were recovered in Galveston Bay, over one week after the casualty. He testified that he did not find burns "to any noticeable degree." These bodies were puffed and swollen to such an extent that examination was difficult. The undertaker thought that the death of each of these men was caused by drowning.

Even the death certificates do not support the theory that death could have been caused by the toxic or poisonous effects of the chemical under observation. Five of the certificates gave the cause of death as "drowning, due to jumping overboard"; five of the certificates gave the cause of death as "suffocation, 2nd & 3rd degree burns," and one certificate gave the cause of death as "septisemia, due to major thermal body burns." Even as to the decedents whose deaths were attributed to drowning, the funeral director conceded that there were burns on the bodies.

In any event, both in the testimony and on the argument, the theory of the Consul General was fully presented to, and explored by, the able trial judge. After analyzing all of the evidence, he found that the deaths and personal

injuries were caused by fire.[22] While this specific finding was not made at the time of ruling on Cyanamid's motion for dismissal, no additional evidence was produced on the subject. For that matter, the final dismissal as to Cyanamid is a part of the main interlocutory decree, from which this appeal is prosecuted. This dismissal, of course, was entered after the entry of the findings and conclusions. Therefore, Cyanamid is entitled to the benefit of each finding on which the decree is based.

If, in fact, it could be said that the judge failed to make a finding on the issue of the cause of death or injuries, nevertheless, the burden of proof on that issue was on the Consul General. Consequently, all facts not embraced in the specific findings should be regarded as not proved by the party having the burden of proof. *Shapiro v. Rubens,* 166 F.2d 659 (7th Cir. 1948); *Container Patents Corp. v. Stant,* 143 F.2d 170 (7th Cir. 1944), *cert. denied* 323 U.S. 734. Appellant had a right to seek a specific finding if he so desired.

Any other finding by the judge, on the record before him, would be based on pure speculation and guess work. This is conceded by Dr. Brieger, the principal witness for China Union and its dead and injured crew members, who testified that an autopsy would be required before even an expert could express an opinion on whether any one of

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22 "As a result of the fire caused by the collision, Houston Ship Channel Pilot Duncan and the following crew members of UNION RELIANCE were killed: Lan Jing-Chau, Chen Teh-Yao, Wu Hsing-Rei, Wu Shih-Ming, Pao Fuh-Gen, Huang Ah-Tong, Hu Ah-Wang Ting Chea-Fah, Yuan Sing-Wang, Hsia Lian-Ken, and Koo Kuang-Yan; and the following were injured: Hau Wen-Tsai and Mang Han-Ying. In addition, much of the cargo of the UNION RELIANCE (principally that in the forward holds of the vessel) was lost, as well as the personal effects of the crew." (R. 5130.)

these men died from exposure to acrylonitrile.[28] With the opinion in the record, a trial judge could arrive at no conclusion other than that the Consul General had failed in his burden of showing that death or injury was caused from the toxic effects of the acrylonitrile.

Completely disregarding the effect of the controlling finding that fire was the cause of the deaths and personal injuries, both China Union and the Consul General again point to testimony indicating a practice in the chemical industry to construct cofferdam space around tanks in which dangerous chemicals are to be transported and that one of the purposes of such construction was to prevent the escape of such chemicals in the event of a collision. Other testimony indicates that it was a common practice in the industry to carry dangerous chemicals away from the skin of the ship. Doctor Brieger testified that sufficient bodily contact with acrylonitrile would, in his opinion, cause death by ingestion or by inhalation of its fumes. He, likewise, opined that acrylonitrile was much more poisonous than a five percent dilution of hydrocyanic acid which, by Coast Guard Regulations, was classified, for transportation purposes, as a Class B poison. He thought that the statement in Cyanamid's literature that acrylonitrile produces symptoms "similar to those produced by hydrogen cyanide"

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[28] "An autopsy would show whether the man, in addition to the effect of the fire, has absorbed large quantities of acrylonitrile, which, as I have told, will be converted into cyanide, a very easy affair; it can be shown with a spectrophotometer and otherwise; and if such an autopsy is made, one can state whether this individual had absorbed such quantities of acrylonitrile that they in themselves would have killed this man. **But this can only be done—such a statement can only be made if a proper autopsy has been made, or if the blood is bright red; that's a much simpler method. It would indicate that the man has indeed absorbed very large quantities or large quantities of acrylonitrile, with the consecutive development of cyanide.**" (Emphasis supplied.) (R.2129.)

was incorrect. His thought was that the symptoms were precisely the same, but this is a mere play in words, and not of substance. He also believed that if rat tests had been made by the Coast Guard with the chemical, it probably would have been classified in a Class B category as toxic or poisonous in nature. The judge was not bound to accept and apply these opinions. He was only bound to give to them such weight as he thought they deserved and he was at liberty to entirely reject them if he felt that the reasons given in support thereof were unsound. This rule is applicable to a trial judge, as well as a trial jury. *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620, 627-628 (1944). Also, the judge had the opportunity to see and hear the witness and pass on his credibility.

Beyond that, the printed record of this witness' testimony presents a portrait of considerable doubt on his part as to whether the Coast Guard, in fact, wrongfully classified the chemical. In its final analysis, this witness' testimony does not require a finding that Cyanamid knew, or by the exercise of reasonable diligence should have known, that the Coast Guard classification of the chemical was in error. Of significance, though not controlling, is the fact that the casualty occurred in November, 1961. There was an immediate Coast Guard investigation. The classification of acrylonitrile has been reviewed by the Coast Guard on at least three occasions[24] since the casualty and remains in the same classification. The legal principles applied in *Whorton v. T. A. Loving & Co.*, 344 F.2d 739 (4th Cir. 1965), are sound, but the factual background there discussed is so far removed from ours that such principles

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[24] (1) 46 C.F.R. § 146.21-100, p. 172, § 146.25-200, p. 495-694; (2) 46 C.F.R. § 146.10-100, p. 20, § 146.25-200, p. 220-256; (3) Federal Register, December 24, 1964, Vol. 29, No. 248, pp. 18163-18168.

cannot be here applied. For the purpose of this opinion, we have assumed that liability would attach to Cyanamid if the evidence disclosed a breach of duty, tortious or contractual.

Aside from everything else, it would appear that the proximate cause of death of and injuries to the seamen, and for that matter all other damages, was not the inherent nature of acrylonitrile, nor any lack of care in its manufacture, nor in giving notice of its toxic or poisonous qualities, nor its stowage location on the ship, but was the unanticipated wrongful action of the RELIANCE in crossing to the wrong side of the channel and propelling its ax like bow against, and substantially through the tank in which the chemical was stowed. The remarkably clear pictures in evidence demonstrate that the RELIANCE ruptured the skin of the BEREAN and advanced into the hull to a depth of approximately 14 feet. Obviously, the inside skin of a cofferdam would have been ruptured and such a dam would not have prevented the escape of the chemical. Under the weight of this assault, a cofferdam would have provided no more protection that would a sheet of tissue paper.

b. Dissenting Opinion of Judge Brown.

BROWN, Circuit Judge, concurring in part and dissenting in part:

I concur fully in all of the very excellent opinion prepared for the Court by Judge Kilkenny except as to some portions in the section entitled "Assignment V" as to which I have some reservations and that part entitled "Claim Against Cyanamid" which I believe to be erroneous. As to the latter I dissent. My difference would not change the result as between BEREAN and RELIANCE, between RE-

LIANCE'S Cargo and RELIANCE, between the injured/decedents and RELIANCE and her owners, or the denial of relief as to injured/decedents against BEREAN. It would afford RELIANCE and the injured/deceased victims the right to show that damages and injuries were caused or aggravated by Cyanamid's neglect of its duties. To this extent and for this purpose, I believe the case should be reversed and remanded.

As to "Assignment V.," I accept the proposition that a shipowner is entitled to rely on the classification of the material and the stowage requirements prescribed by the regulatory agency, here the Coast Guard. There may, however, come a time when a carrier acquires so much knowledge about the peculiar characteristics of a particular cargo, which are not generally known, that it can no longer rely solely on the insulation afforded by reading and applying Coast Guard regulations which it knows in fact are either wrong or incomplete. The aim of the regulations, the aim of the law, is to promote safety, especially to the innocent third parties—crew members, longshoremen, persons on other vessels, members of the public, and others—who are likely to be exposed to the hazards of the product in its normal course of distribution, transportation, and handling. That aim is hardly achieved by an absolute which declares that a shipowner may ignore hazards not disclosed by the Regulations, but of which it knows and knows how to minimize by prudence. This is a long way from making every shipowner his own chemist, physicist, physical chemist, or the like in this day of scientific marvels and new esoteric products.

But Cyanamid is in no such favored position. It is the manufacturer and supplier of a chemical that it knows can

and does kill. Cyanamid's awesome obligations in this day of products liability when Acrylonitrile goes to sea is no less than on land. It cannot rely on—and the proof does not even begin remotely to suggest that it ever did, or would, rely on—the Coast Guard. Cyanamid knows that if it—a huge industrial enterprise which proudly claims a preeminence in this chemical field—relied on the Coast Guard with its limited laboratory facilities for its research and development, it would go bankrupt. The Coast Guard might come to it, but it would never, simply never, go to the Coast Guard to ascertain what the characteristics and hazards of its own product are.

So while the law affords to BEREAN the right to accept a faulty Coast Guard classification, Cyanamid can claim no such privilege. Its own published pamphlet entitled "Handling-Storage-Analysis of Acrylonitrile," introduced as an exhibit and to which the Court's opinion refers, makes it clear that it was, as Dr. Brieger testified, no less toxic than a Class B poison since it was more toxic than the test standard 5% dilution of hydrocyanic acid. Dr. Brieger had preeminent qualifications which Cyanamid never challenged—indeed could not challenge.[31] If, as the Court suggests, his testimony was guarded, occasionally hesitant, it was, as the quoted reference to autopsies (see note 23) reveals, just another clear proof of his scientific competence. Time and time again, he made plain, based upon a lifetime study and industrial experience with this very compound, that for seamen to be afloat in water having a film of Acrylonitrile on the surface[32] would mean almost certain

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[31] Dr. Brieger had made tests and reports on Acrylonitrile which were submitted to Cyanamid.

[32] In the collision, No. 1 port wing tank was ruptured. All of the 226 tons of Acrylonitrile spilled out into the channel.

death.[33] And that is what Cyanamid's own pamphlet reflected in vivid terms.[34]

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[33] Ironically the record reveals that about a year after this collision, the Master of BEREAN was killed by Acrylonitrile fumes resulting from a very small leak in the pump room. No one, certainly not Cyanamid, suggests that this post-collision event was an untoward surprise to those knowledgeable about Acrylonitrile.

[34] As to handling the chemical, Cyanamid explains:

> "The precautions set forth in this bulletin are the results of the experience gained in handling and storing Acrylonitrile during this period. It should be emphasized at the outset, that because of the toxic and flammable nature of Acrylonitrile, handling operations should be performed in areas which are properly ventilated and free from sources of ignition."

As to cleaning tanks in which Acrylonitrile has been stored, Cyanamid warns:

> "Protective equipment should be made available to those entering [storage] tanks. This equipment should include cover-alls, eye goggles, and gas masks. * * * The person working in the tank should be provided with a body harness with life line attached. Station a man on the outside end of the life line to do nothing but watch the worker within."

And the type of gas mask required differs with the concentration of the chemical's vapors:

> "Use this type of canister (organic vapor) **only** in locations where Acrylonitrile vapor content is less than 2% and the oxygen concentration is above 16%. Otherwise a mask with self contained oxygen or air supply **must** be employed." [Emphasis in original]

Cyanamid is the last to minimize the effects of the chemical on the human body:

> "Acrylonitrile is toxic by inhalation, by absorption through the skin, and by oral ingestion.
>
> "* * *
>
> "Poisoning by Acrylonitrile produces symptoms which are similar to those produced by hydrogen cyanide. Excessive vapor inhalation causes weakness, headache, sneezing, abdominal pain, and vomiting. Absorption of large amounts of the liquid through the skin produces similar symptoms. * * *."

The question is not whether BEREAN was at fault in loading Acrylonitrile in skin tanks unprotected by cofferdams. The question is whether Cyanamid knowing what it does, could knowingly load BEREAN at Cyanamid's terminal knowing also that the cargo was going into skin tanks. In this respect Cyanamid had duties that transcended those it owed to Andersen or BEREAN and which, the Court supposes, it perhaps satisfied by showing the Master the blue pamphlet. It owed a duty literally to the world—at least

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And in describing the proper methods of waste disposal, the manufacturer warns of the danger to fish:

> "Acrylonitrile stream effluents should be treated to such an extent that they pose no danger to downstream public water supplies or to aquatic life. * * * Although it has been demonstrated that fresh-water fish can tolerate an Acrylonitrile level of 10 p.p.m., the actual tolerable limit will depend on local conditions and use of streams."

And if that "aquatic life" happens to be seamen afloat, who will both absorb and breath vapors, "the currently accepted threshold limit for * * * an eight-hour exposure is 20 parts of vapor per million parts of air," which makes it more toxic than carbon tetra chloride (25 p.p.m.) but only slightly less toxic than hydrogen cyanide (10 p.p.m.) Nevertheless, the chemical is toxic enough so that "the regimen of treatment [by a physician] recommended for Acrylonitrile poisoning is that for cyanide poisoning."

In several places and ways the pamphlet equates Acrylonitrile with Hydrogen Cyanide (Hydrocyanic Acid). This is a Class A poison, § 146.25-5, defined as "poisonous gases or liquids of such nature that a very small amount of gas, or liquid, mixed with air is dangerous to life." As such it is listed with only 13 other poisons, three of which are military poisonous gases. And footnote 1 to Hydrocyanic Acid permits dilute solutions not exceeding 5% strength to be classed as Class B poisons. Class B covers "Poisonous liquids or solids * * * other than Class A, C or D poisons, which are known to be so toxic to man as to afford a hazard to health during transportation." § 146.25-10. Rat and rabbit ingestion, absorption and inhalation test standards are thereafter prescribed. There is no evidence to refute Dr. Brieger's testimony that Acrylonitrile would fail these tests.

that world within the reach and protection of American jurisprudence, land-based, salt water and amphibious. It had to have in mind port workers at the place of loading, crew members on the carrying vessel, crew members on accessorial tugs, owners and crew members of vessels with which the carrying vessel might come in contact by collision or otherwise, port officials, customs inspectors, immigration officers, maritime service personel, and members of the public. The duties owed to this limitless group of protectees require as a minimum that it not knowingly participate in a method of handling or transport which would imprudently imperil the lives of these people. I do not suggest here that Cyanamid, the manufacturer-supplier-shipper, has the liability of an insurer, but it certainly has the far-reaching awesome liabilities now associated with products liability. *Putman v. Erie City Mfg. Co.*, 5 Cir., 1964, 338 F.2d 911, Restatement, Torts §388. When the material is fraught with so much danger, the liabilities may be almost absolute either because the so-called ordinary care of the prudent person itself calls for care which is extraordinary or because of principles of strict liability. Indeed, this teaching of Texas City was not lost to the industrial or judicial world because the Government as the manufacturer of FGAN escaped liability from the peculiar governmental "discretionary function" exemption, *Dalehite v. United States*, 1953, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427, ... AMC . . . ., or the stringent limitation of the scope of the FTCA to exclude "novel and unprecedented" cases, a reading which was shortly to be repudiated. *Rayonier v. United States*, 1957, 352 U.S. 315, 319, 77 S.Ct. 374, 1 L.Ed.2d 354.

But the trial Judge never really faced up to this issue. Nor does this Court. Rather, each equates Cyanamid's obligations with those the carrying vessel BEREAN owed to

others. As to the BEREAN, the Coast Guard regulations, so long as BEREAN did not know they were faulty, were an adequate insulation. But in relation to members of the public and others, Cyanamid could not fall back on the Coast Guard. The problem was really not whether the Coast Guard classification was in error, as Dr. Brieger tried to demonstrate. Rather, it was what Cyanamid actually knew and ought to have known about its own product and knowing that, what in prudence considering these extremely high hazards could and ought to be done to minimize,[35] if not eliminate, the devastating consequences of a foreseeable casualty.

This was a basic error in approach by the District Judge. And our efforts to overcome the deficiency by questioning the standing of China Union to assert the claim and to hold as a matter of law that there could be no proof of *causation* as to the claims of the injured/deceased will not suffice. We must recall that this case, as are all extensive maritime catastrophes, was being tried in two stages—liability and damages. This is the first time, to my knowledge, for example, in which death certificates, issued generally in Texas by people whose only competence is the lowest office in the judicial hierarchy—prove the cause of death. I agree the issue has not been proved. No more so was the damages sustained by BEREAN or its cargo. That is to come later. As to China Unions' standing, at the liability phase only, who is to say that had the fumes from this lethal cargo not have been freed by rupture of the hull forming the tank sides, the action on RELIANCE might not have been different?

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[35] BEREAN had main tanks 1 through 8 divided by longitudinal bulkheads affording a series of 16 inboard tanks fully separated from the ship's hull by wing tanks on each port and starboard, side.

On this record, the Judge should have held that as against Cyanamid a prima facie case had been made out. Cyanamid should have been put to its proof to refute, if it could, the hazardous characteristics, and on what prudence would require of the manufacturer-supplier-shipper of a product of such deadly potential.[36] The Judge would then have decided whether Cyanamid had the usual land-based products liability of a chemical manufacturer. If he declared in the affirmative, proof of damages, if any—and I do not minimize the if any—would be opened for a second stage on damages.

The admiralty has led, not followed. But here salt water dilutes the responsibility now so plainly resting on the manufacturer-supplier-shipper of a commercially useful, indeed valuable, chemical compound which carries death with its utility.

I would therefore reverse for further hearing as appropriate on the claims of RELIANCE and her owners, and the injured/decedents against Cyanamid.

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[36] Indeed at this point the Coast Guard regulations might turn on Cyanamid to prescribe an absolute standard. Cf. Marshall v. Isthmian Lines, Inc., 5 Cir., 1964, 344 F.2d 131, ... AMC . . . . If, as Dr. Brieger so stoutly maintained, the rat tests prescribed by § 146.25-10(1)(2) (see note 34, supra) would bring Acrylonitrile within Class B poisons, then it is undisputed that for a combustible liquid having lethal characteristics and defined as a Class B or Class C poison, such cargo must be carried in tanks which are independent of the ship's hull, separated by cofferdams, etc. 46 C.F.R. § 39.01-1, .05-1. The significance of such tests would not be to establish that classifying Acrylonitrile as inflammable by the Coast Guard was erroneous as such. Rather, since a manufacturer knows what accepted tests would reveal, the significance would be to forbid the manufacturer as shipper to tender it for shipment without disclosing all these characteristics and to knowingly participate in a loading or shipment which, with such knowledge, it knows to be dangerous. Cf. 46 USCA § 170(10).